A

Heng Yea Lee & Anor v Cheah Cheng Lan

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N–02–1309 OF 2005

B MOKHTAR SIDIN, ZULKEFLI AND SURIYADI JJCA

3 APRIL 2007

Companies and Corporations — Member's rights — Oppression — Whether affairs of

C *company conducted or powers of appellants exercised in a manner oppressive to or in disregard of respondent's interest — Whether respondent suffered prejudice and unfair discrimination — Respondent denied right to appoint additional director — Second appellant proposed that first appellant be paid backdated salary — Appellants had spirited away the company's investment in related companies to themselves — Companies Act 1965 s 181*

D

Betting, Gaming and Lottery — Gaming — Licence — Whether Racing (Totalisator Board) Act 1961 prohibit or forbid assignment of all rights of the licencee to the company

E

The first appellant was a shareholder and director of a private limited company called Jee Tra Trading (M) Sdn Bhd ('the company'). She held 50% of the issued and paid up capital of the company. The respondent also held 50% of the issued and paid up capital of the company. The company's principal businesses were Pan Malaysian Big

F Sweep and the lucrative Numbers Forecast Agency for Pan Malaysian Pools Sdn Bhd at three outlets. To operate these outlets, the company had the usage of three licences, each issued under the personal names of the respondent, first appellant and second appellant respectively. Three agency agreements were executed between them and the company, whereby the agreements had created a trust in favour of the company. Each

G of the appellants and respondent, referred to as nominees in the agreements had agreed that the licences be used for the exclusive use and benefit of the company. Later the first appellant had brought in her husband, the second appellant into the company as a nominee director pursuant to art 81 of the Articles of Association of the company ('art 81'). The respondent filed a petition under s 181 of the Companies Act 1965 ('the Act'), alleging that the affairs of the company were being conducted

H or the powers of the appellants were being exercised in a manner oppressive to or in disregard of the respondent's interest, and she had suffered prejudice and unfair discrimination within the meaning of s 181(1)(a) and (b) of the Act. The High Court found for the respondent and hence this appeal.

I

Held, dismissing the appeal:

(1) The Racing (Totalisator Board) Act 1961 ('the Racing Act') did not prohibit or forbid the assignment of all the rights of the first appellant in the licence, to the company. The Racing Act was deliberately promulgated to provide for

the establishment of a Totalisator Board, the powers of such board, the conduct of betting by agencies of such board, and for matters incidental thereto. The fact that the licences could be transferred or the ownership transferred, if allowed by the Ministry of Finance, rejected any notion that the Racing Act prohibits the appellants' contractual acts (see para 26).

(2) Article 81 in clear terms empowered a member to nominate a director for every 25% of the issued capital of the company held by him or nominees. Yet at the board meeting of the company, despite the respondent having moved the board for her rights and entitlement to equal management and control in exercise of that right, in the like of the appointment of an additional director, it was rejected. In other words, her 50% share and rights entrenched in the Articles of Association of the company, counted for nothing as they had been rendered meaningless by the combined force of the first appellant and the second appellant. This was despite the fact that art 82 Articles of Association of the company not only allowed nomination but also appointment without the necessity of the board's deliberation. The rejection of the respondent's nomination by itself tantamount to oppression (see paras 28–29); *Chloride Eastern Industries Pte Ltd v Premium Vegetables Oils Sdn Bhd* [2002] 2 MLJ 43 referred.

(3) The second appellant's proposal that the first appellant be paid a salary backdated to 1 July 1999 was not only contrary to art 85 of the Articles of Association of the company, which provided that a director's remuneration be determined at a general meeting, but also contrary to the agreed equal ownership and equal benefits principle. With the effective implementation of that backdated payment of salary and remuneration proposal to the first appellant, she and the second appellant had collectively earned more than double that of the respondent's financial entitlement. This decision therefore was beyond justification as only the general meeting, and not the board of directors, held the power to decide on a director's salary let alone backdating it. As payments had already been made, with such remuneration being a form of self-enrichment pursuant to oppressive conducts, the appellants therefore must return those ill-gotten gains (see paras 33, 35).

(4) Even if the respondent had not attended the relevant meetings, her 50% financial rights could not be disregarded; resolutions which were against her interest or the company too should not have been passed (see para 36).

(5) The appellants had also spirited away the company's investment in related companies to themselves. It is fundamental that during the 'oppressive period' they were occupying a fiduciary position, and entrusted to deal with the company's properties for the benefit of the company. They were thus barred from using or dealing with the entrusted properties for their private benefit (see paras 37–38).

[Bahasa Malaysia summary

Perayu pertama merupakan pemegang saham dan pengarah sebuah syarikat sendirian berhad bernama Jee Tra Trading (M) Sdn Bhd ('syarikat tersebut'). Beliau memegang 50% daripada modal keluaran dan berbayar syarikat tersebut. Responden juga

memegang 50% daripada modal keluaran dan berbayar syarikat tersebut. Perniagaan utama syariakt tersebut adalah Pan Malaysian Big Sweep dan Numbers Forecast Agency yang menguntungkan untuk Pan Malaysian Pools Sdn Bhd di tiga saluran keluar. Untuk menjalankan saluran keluar berikut, syarikat tersebut menggunakan tiga lesen, setiap satu dikeluarkan atas nama-nama peribadi responden, perayu dan perayu kedua masing-masingnya. Tiga perjanjian agensi telah disempurnakan antara mereka dan syarikat tersebut, di mana perjanjian-perjanjian itu membentuk amanah bagi pihak syarikat tersebut. Setiap daripada perayu-perayu dan responden, dirujuk sebagai calon dalam perjanjian-perjanjian itu, telah bersetuju agar lesen-lesen itu digunakan untuk penggunaan eksklusif dan faedah syarikat tersebut. Berikutan itu perayu pertama telah memasukkan suaminya, perayu kedua ke dalam syarikat tersebut sebagai calon pengarah menurut artikel 81 Artikel Persatuan syarikat tersebut ('artikel 81'). Responden telah memfailkan petisyen di bawah s 181 Akta Syarikat 1965 ('Akta tersebut'), mendakwa bahawa urusan-urusan syarikat telah dikendalikan atau kuasa-kuasa perayu-perayu telah digunakan secara menindas terhadap atau tidak mengendahkan kepentingan responden, dan beliau telah mengalami prejudis dan diskriminasi yang tidak adil dalam maksud s 181(1)(a) dan (b) Akta tersebut. Mahkamah Tinggi memutuskan bagi pihak responden dan justeru itu rayuan ini dibuat.

Diputuskan, menolak rayuan tersebut:

(1) Akta Perlumbaan (Lembaga Totalisator) 1961 ('Akta Perlumbaan') tidak menghalang atau menegah pemberian semua hak-hak perayu pertama dalam lesen itu, kepada syarikat tersebut. Akta Perlumbaan diisytiharkan semata-mata untuk membolehkan penubuhan Lembaga Totalisator, kuasa-kuasa lembagan sedemikian, perbuatan membuat taruhan oleh agensi-agensi lembagan sedemikian, dan untuk perkara-perkara sampingan. Hakikat bahawa lesen-lesen tersebut boleh dipindahkan atau pemilikannnya dipindahkan, jika dibenarkan oleh Kementerian Kewangan, menolak apa-apa andaian bahawa Akta Perlumbaan itu melarang tindakan-tindkan kontraktual perayu-perayu (lihat perenggan 26).

(2) Perkara 81 dalam terma yang jelas memberikan kuasa kepada seorang ahli untuk mencalonkan seorang pengarah untuk setiap 25% daripada modal yang dikeluarkan oleh syarikat tersebut yang dipegang olehnya atau calon-calonnya. Namun di mesyuarat syarikat tersebut, meskipun responden telah memohon lembaga untuk hak-hak dan kelayakannya agar mendapat pengurusan dan kawalan yang sama dalam penggunaan hak tersebut, seperti pelantikan pengarah tambahan, ia ditolak. Dalam erti kata lain, 50% daripada saham dan hak-haknya yang termaktib dalam Artikel Persatuan syarikat tersebut, tidak dikira keran dianggap tidak bermakna dengan gabungan kuasa perayu pertama dan perayu kedua. Ini adalah meskipun pada hakikatnya artikel 82 Artikel Persatuan syarikat tersebut bukan hanya membenarkan pencalonan tetapi juga pelantikan tanpa memerlukan pertimbangan lembaga. Penolakan pelantikan responden dengan sendirinya sama seperti penindasan (lihat perenggan 28–29); *Chloride Eastern Industries Pte Ltd v Premium Vegetables Oils Sdn Bhd* [2002] 2 MLJ 43 dirujuk.

(3) Cadangan perayu kedua agar perayu pertama dibayar gaji yang dikira ke belakang kep 1 Julai 1999 bukan sahaja bertentangan dengan artikel 85 Artikel Persatuan syarikat tersebut, yang memperuntukkan bahawa gaji pengarah hendaklah ditentukan di mesyuarat am, tetapi juga ebrtentangan dengan prinsip pemilikan sama rata dan faedah sama rata yang dipersetujui. Dengan mulanya pelaksanaan cadangan bayaran gaji dan ganjaran ke belakang itu kepada perayu pertama, beliau dan perayu kedua secara koletif memperoleh lebih dua kali ganda daripada kelayakan kewangan responden. Keputusan ini tidak dapat dijustifikasikan kerana hanya mesyuarat am, dan bukan lembaga pengarah, yang memegang kuasa untuk memutusakan tentnag gaji pengarah apa lagi tentang mengiranya ke belakang. Memandangkan bayaran telahpun dibuat, yang mana ganjaran sedemikian membentuk pengkayaan sendiri berikutan perbuatan yang menindas, perayu-perayu tersbeut patut memulangkan keuntungan yang diperolehi secara salah (lihat perenggan 33, 35).

(4) Jikapun responden tidak menghadiri mesyuarat berkaitan, 50% daripada hak kewangannya tidak boleh diketepikan, resolusi yang bercanggah dengan kepentingannya atau syarikat tersebut juga tidak patut diluluskan (lihat perenggan 36).

(5) Perayu-perayu juga telah melarikan pelaburan syarikat tersebut dalam syarikat-syarikat berkaitan dengan mereka. Adalah penting semasa 'tempoh penindasan' mereka menjawat kedudukan fidusiari, dan diamanah untuk mengendalikan hartanah syarikat tersebut untuk manfaat syarikat tersebut. Mereka oleh demikian dihalang daripada menggunakan atau mengendalikan hartanah-hartanah yang diamanahkan untuk mendapat manfaat peribadi (lihat perenggan 37–38).]

Notes

For a case on gaming licence, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 3130.
For cases on oppression of member's rights, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 440–483.

Cases referred to

Chloride Eastern Industries Pte Ltd v Premium Vegetables Oils Sdn Bhd [2002] 2 MLJ 43 (refd)
Leong Poh Chin v Chin Thin Sin [1959] MLJ 246 (refd)
Nam Seng Co v Wing Yew (Tawau) Co Sdn Bhd [1978] 2 MLJ 198 (refd)
Ng Sing King & Ors v PSA International Pte Ltd & Ors (No 2) [2005] 2 SLR 56 (refd)
Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1981] 3 MLJ 151 (refd)

Legislation referred to

Betting Act 1967 s 21
Companies Act 1965 ss 167(6), 181(a), (b)
Contracts Act 1950 s 24
Forest Enactment (Cap 153)
Forest Enactment 1968 ss 20, 22, 24
Forest Rules 1969
Racing (Totalisator Board) Act 1961

Appeal from: Civil Suit No 26–1 of 2004 (High Court, Seremban)

Christopher Fernando (Muhammad Faiz Fadzil with him) (Aris Rizal Christopher Fernando & Co) for the appellants.
Dato' M Pathmanathan (M Pathmanathan & Co) for the respondent.

Suriyadi JCA (delivering judgment of the court):

[1] The first appellant is a shareholder and director of a private limited company called Jee Tra Trading (M) Sdn Bhd ('the company'), incorporated under the laws of Malaysia on 8 February 1986. She holds 132,501 ordinary shares of the company representing 50% of the issued and paid up capital. The respondent also holds 50% of the issued and paid up capital of the company. In a nutshell these two personalities, holding equal share in the company, are the owners of the company. This company's principal businesses are the Pan Malaysian big Sweep and the lucrative Numbers Forecast Agency for Pan Malaysian Pools Sdn Bhd at three outlets. It is a company that carries out the business of gambling.

[2] To operate these outlets this company had the usage of three licences, each issued under the personal names of the respondent, first appellant and second appellant obtained from a company called Usaha Tegas Sdn Bhd. Three Agency Agreements were executed between these persons and the company, whereby the agreements had created a trust in favour of the company. Each of the appellants and respondent, referred to as nominees in the agreements, had agreed that the licences be used for the exclusive use and benefit of the company.

[3] Later the first. appellant had brought in her husband, ie the second appellant into the company as a nominee director pursuant to article 81 of the Articles of Association of the company, the precursor provision that led to many of the current problems. The second appellant did not own a single share in the company. The respondent did not immediately reciprocate by nominating her husband one Chua Boon Chew, a founder member of the company, as at that relevant time he had been adjudicated a bankrupt. His shares had been taken over by the respondent. The abovementioned art 81 reads as follows:

> 81. The Directors shall be nominated by the Members and a Member shall be entitled to nominate a Director for every Twenty Five per centum (25%) of the issued capital of the Company measured in nominal value held by him or his nominees.

[4] In a word, pursuant to the above provision, in term of numbers the respondent and the first appellant were entitled to appoint two directors each, purposefully to ensure conferment of equal representation, management and control of the board of directors of the company. That purport was founded on that equal shareholding of the respondent and the first appellant in the company.

[5] This nomination of the second appellant by the first appellant, was one of the causes of this case, as it involved dollars and cents whereat initially as equal

shareholders the respondent and the first appellant were each entitled directors fees and remuneration on an equal basis. With the entry of the second appellant as a director, invariably in monetary terms the financial advantages tilted towards this husband and wife team, much to the chagrin of the respondent. With two voices, as against her solitary voice in the board of directors' meetings, the respondent slowly lost her grip over the company. She saw oppression upon oppression piling up against her, leading eventually to the filing of the petition, the very foundation of this appeal.

[6] In the said petition the respondent had prayed, inter alia, for:

(a) a declaration that the first and second appellants had conducted the affairs of the company, and in the exercise of their powers as directors of the company, in a manner that was oppressive, discriminatory and prejudicial to the respondent and/or in disregard of her interest;

(b) a declaration that the respondent was entitled to nominate one Tan Kee Hooi (f) (NRIC No 700417-07-5874) as a director of the company pursuant to art 81 and which nomination be given effect by the company secretaries by filing the statutory records of the said appointment with the Companies Commission of Malaysia;

(c) a declaration that the resolution of the board of directors dated 10 November 1999 authorizing the company to pay the first appellant additional salary with effect from 1 July 1999 being contrary to arts 85 and 81 of the Articles of Association and consequently not valid and inoperative;

(d) an order that the first and second appellants refund to the company the unauthorized and improper directors salary and remuneration and advances they had received as at 30.06.2003 totalling RM1,050,829.55;

(e) an order that the first and second appellants refund to the company the unauthorized and improper directors salary and remuneration, advances and all other payments they had received with effect from 1 July 1999 till date of judgment;

(f) an order that the company repay the respondent the sum of RM174,976.59 which was due and owing to her;

(g) an order that the directors' salary, fees and remuneration be paid to the respondent and the first appellant in equal shares and amounts and that the second appellant was not entitled to receive any payments whatsoever in his own right;

(h) an order that pursuant to s 167(6) of the Companies Act 1965, Mr Leong Siew Hoong (NRIC No 560326-10-5925), an approved company auditor, practising as a sole proprietor under the name and style of Leong Siew Hoong & Co, be authorized to inspect the accounting and all other records of the company;

(i) an order that the cheque signatories be changed and that all cheques be signed by both the respondent and the first appellant only;

(j) a declaration that all the shares in Ariffin Nordin Holdings Sdn Bhd held and registered in the names of the 1stand second appellants, were held in trust and for the absolute benefit of the company, and be transferred to the company;

(k) that the first and second appellants by themselves, their servants and/or agents or otherwise whosoever be restrained from conducting the affairs of the company in a manner that was oppressive, prejudicial and/or was otherwise discriminatory to the respondent and/or in disregard of her interest;

(l) the first and second appellants be restrained from disposing, transferring or otherwise dealing with or causing the disposal, transfer and/or dealing with any properties, assets or shares held by them and by Ariffin Nordin Holdings Sdn Bhd in trust for the company;

(m) costs of this proceedings be borne by the first and second appellants on a full indemnity basis; and

(n) such further orders.

[7] These additional acts of oppression, inter alia, came in the following form:

(i) abuses by the first and second appellants, when by their domineering nature, and without the consent and approval of the respondent, had arrogated unto themselves powers, eg the second appellant had assumed the positions of managing director of the company and chairman of the Board of Directors at meetings and thereafter making many a decision;

(ii) the second appellant had thereafter appointed Insan Management Sdn Bhd, which provided the company secretaries and Lew Row Onn & Co as the auditors, both of whom took instructions only from the second appellant personally, in total disregard of the interest of the company;

(iii) in accordance with his whims and fancies the second appellant had initiated and utilized the funds of the company, as he was one of the authorized cheque signatories, to purchase several properties and to invest, through shareholdings and loans, in the business and projects of associated companies (Kumpulan Ariffin Nordin Sdn Bhd, Mittora Sdn Bhd and Ariffin Nordin Holdings Sdn Bhd);

(iv) the second appellant, in spite of repeated requests by the respondent for information and particulars about the company's shareholdings in the Associated Companies, had refused to furnish or divulge any information whatsoever;

(v) the persistent queries and unhappiness expressed by the respondent relating to the oppressive and prejudicial manner in which the second appellant was managing and conducting the affairs of the company, were disregarded;

(vi) the second appellant had caused the company to transfer 80,001shares in KAN to himself at a par value price of RM80,001 without any valuation of properties held by KAN at a meeting on 18 October 1996;

(vii) at the meeting of the board of directors held on 10 November 1999 the respondent had never agreed to sell her shares to the first appellant contrary to the minutes;

(viii) at that 10 November 1999 meeting the respondent had moved the board for her rights and entitlement to equal management and control, by the appointment of an additional director as her nominee in exercise of her right as a 50% shareholder pursuant to art 81 of the Articles of Association, and a change of the bank's signatories but had been rebuffed;

(ix) also at that meeting of 10 Novemebr 1999 the second appellant had proposed that the first appellant (his wife) be paid a salary backdated to 1 July 1999. This not only was contrary to art 85, which provided that a director's remuneration be determined at a general meeting, but also contrary to the equal ownership and equal benefits principle under art 81;

(x) the appellants had effected and implemented their proposal to backdate payment of salary and remuneration to the first appellant, resulting in the first and second appellants collectively receiving an amount more than double the amount paid to the respondent; and

(xi) the first and second appellants had received from the company loans in the form of advances and as at year ending 30 June 2003 had owed the company a total sum of RM331,120.98, which they have yet to repay.

[8] In a gist the petition was filed under s 181 of the Companies Act 1965, alleging to the effect that the affairs of the company were being conducted or the powers of the appellants were being exercised in a manner oppressive to or in disregard of the respondent's interest, and she had suffered prejudice and unfair discrimination within the meaning of s 181(1)(a) and (b) of the Act. For future easy reference we supply these provisions:

181 Remedy in cases of an oppression

(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground —

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

(2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may —

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) the conduct of the affairs of the company in future;

(c) ...

[9] The High Court judge had heard the case and found on 9 November 2005 for the respondent literally on every prayer, and accordingly had granted:

- a declaration that the first and second appellants indeed had conducted the affairs of the company and exercising their powers as directors of the company, in a manner that was oppressive, discriminatory and prejudicial to the respondent and/or in disregard of her interest;
- a declaration that the respondent was entitled to nominate Tan Kee Hooi (f) (NRIC No 700417-05874) as a director of the company pursuant to art 81 and which nomination be given effect by the company secretaries by filing the statutory records on the said appointment with the Companies Commission of Malaysia;
- a declaration that the resolution of the board of directors dated 10 November 1999 authorising the company to pay the first appellant additional salary with effect from 1 July 1999 was contrary to arts 85 and 81 of the Articles of Association and consequently not valid and inoperative;
- that the first and second appellants refund the company the unauthorized and improper directors salary and remuneration and advances they had received as at 30 June 2003 totaling RM1,050,829.55;
- that the first and second appellants refund the company the unauthorized and improper directors' salary and remuneration, advances all other payments they had received with effect from 1 July 1999 till date of judgment;
- that the company repays the respondent the sum of RM174, 976.59 which was due and owing to the respondent;
- that directors salary, fees and remuneration be paid to the respondent and the first appellant in equal shares and amounts and that the second appellant was not entitled to receive any payments whatsoever in his own right;
- that pursuant to s 167(6) of the Companies Act 1965, Mr Leong Siew Hoong (NRIC No 560326-10-5925), an approved company auditor, practising as a sole proprietor under the name and style of Leong Siew Hoong Co, be authorized to inspect the accounting and other records of the company (sub-s (6) of s 167 reads — 'The court may in any particular case order that the accounting and other records of a company be open to inspection by an approved company auditor acting for a director, but only upon an undertaking in writing given to the court that information acquired by the auditor during his inspection shall not be disclosed by him except to that director');
- that the cheque signatories be changed and that all cheques be signed by both the respondent and the first appellant only;
- a declaration that all the shares in Ariffin Nordin Holdings Sdn Bhd held and registered in the names of the first and second appellants were held in trust and for the absolute benefit of the company and be transferred to the company;
- that the first and second appellants by themselves, their servants and/or agents or otherwise whosoever be restrained from conducting the affairs of the company in a manner that was oppressive, prejudicial and/or was otherwise discriminatory to the respondent and/or in disregard of her interest;

— that the first and second appellants be restrained from disposing, transferring or otherwise dealing with or causing the disposal, transfer and/or dealing with any properties, assets or shares held by them and by Ariffin Nordin Holdings Sdn. Bhd. in trust for the company;

— that the costs of this petition be taxed and paid by the first and second appellants; and

— that the respondent was given liberty to apply.

[10] From the above order, it was noted that apart from the court agreeing that the first and second appellants had acted oppressively and discriminatorily toward the respondent, the absorption of the second appellant into the company was not rejected, so long as the equal management of the company between the respondent and the first appellant was maintained. If any payment were to be received by the second appellant, then it was to be sourced from the share of the first appellant, and not from the respondent's share. To counter balance the presence of the second appellant the respondent was entitled to nominate Tan Kee Hooi as her nominee in the company. Any unauthorized payments to the first and second appellants accordingly must be refunded and any monies due and owing to the respondent were also required to be paid. The payment of directors' salary, fees and remuneration to the respondent and the first appellant in equal shares and amounts was maintained; now all cheques must be signed by the respondent and the first appellant only.

[11] An appeal was filed by the two appellants hence the matter before us. Having heard the appeal we had unanimously dismissed it with costs. We now supply ours reasons for the dismissal.

[12] To appreciate the matter at hand, there is a necessity for us to highlight a few suggestions made by the appellants at the early stages of the hearing. Counsel for the appellants had suggested that time could be saved if the court were to decide on the status of the abovementioned three agency agreements of 30 May 1989 first, in that if they were found null and void the matter ends there and the appeal allowed. The appellants, restricting their arguments to their own two agreements executed on 20 December 88 and 13 December 1988, had canvassed that the Agency Agreements were subject to the Racing (Totalisator Board) Act) 1961 as the licences were subject to it. One of the conditions of the licences was that they could not be assigned or their ownership changed unless permitted by the Finance Ministry. With the assignment of rights to the company, which act was forbidden by the above 1961 Act, those two agency agreements therefore were null and void as they had contravened s 24 of the Contracts Act 1950. The relevant portion of this provision reads:

24. The consideration or object of an agreement is lawful, unless —

(a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another, or

(e) the court regards it as immoral, or opposed to public policy.

A In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[13] When the court enquired what the next step would be, if their legal arguments were not accepted, learned counsel for the appellants then stated that we should B proceed to the next stage, ie the finding of facts. On this unsatisfactory answer the court ordered that the matter be heard as per the memorandum of appeal.

[14] The appellants began by stating that the two agreements executed by the company with them dated 20 December 1988 and 13 December 1988 were invalid, C as at the time of signing them, the respondent who had signed on behalf of the company as a director, could not have the authority as she was yet to be appointed as one. She was appointed only on 27 January 1989. The court then had indicated that the first appellant's was in the same predicament as that of the respondent when signing as a nominee. The court made that remark as the first appellant was D appointed a director of the company on 9 December 1988, by two directors pursuant to a resolution, with one of them being Chua Boon Chew. Unwittingly the appellants had earlier supplied the information that the said Chua Boon Chew, the husband of the respondent and founding father of the company, was adjudged a bankrupt sometime in 1984. If he was an undischarged bankrupt surely the status of the first E appellant being a director and a nominee was now suspect. In fact the company's very own existence could be in jeopardy.

[15] This litany of erroneous information was put to a stop when the same counsel for the appellants subsequently clarified that the said Chua Boon Chew was only F made a bankrupt in 1996. That being so the issue of invalid appointments and the status of the company being questionable had become a non-issue. With this concession the appellants' submission that the two agreements executed by them with the company were invalid for want of authority must fail.

[16] As the respondent had not questioned the right of the first appellant to G nominate the second appellant, or had even wanted to oust him, bearing in mind that she too wanted a nominee of her own in the board of directors (BOD) the status of the second appellant therefore thereafter was not queried into by us. That being so, the appeal essentially, so we thought, was restricted to the findings of facts by the learned trial judge, resulting in us merely focusing on the issue of whether there was H indeed oppression committed by the appellants on the respondent.

[17] In spite of the withdrawal of the argument of want of authority, by virtue of the concession of the appellants on the issue of date of adjudication of bankruptcy of Chua Boon Chew, the appellants had still persisted on the invalidity argument, I but this time founded on the statutory prohibition of the Racing (Totalisator Board) Act 1961 of any assignment of the licences. They had ventilated that as the petition was anchored on such illegality the appeal thus must be allowed. The spill over effect of a successful argument would be that all the three betting outlets, one to the respondent and two to the appellants, ought to be returned to them respectively. So, were the agreements executed by the appellants invalid for want of legality?

[18] To reiterate, the focus of complaint by the appellants was that it was statutorily prohibited to assign the impugn licences, and if that had taken place, the two agreements by virtue of s 24 of the Contracts Act 1950 were void. In support of that legal proposition authorities were supplied to the court. The first point of reference was *Leong Poh Chin v Chin Thin Sin* [1959] MLJ 246. The appellant in that case, in consideration of a loan of $1,000 by the respondent had entered into an agreement whereby he purported to assign all his rights and liabilities under a forest permit to the latter's wife. Under the permit the appellant had obtained the right to fell timber in a forest reserve and there was evidence that the respondent's wife did actually operate in purported exercise of rights assigned to her by the appellant. The respondent had obtained judgment against the appellant for the $1,000 claimed as money lent. On appeal the appellant was allowed to add a new ground of appeal. The ground was that from the evidence before the court, the learned magistrate should have found that the plaintiff contract was based on an illegal contract, and should have dismissed the claim on that ground. Allowing the appeal the court had held that under ss 20 and 22 of the Forest Enactment 1968 s 24, a person could not lawfully exercise rights in a reserved forest by virtue of permission granted to someone else. The respondent's wife's exercise of the purported rights assigned to her by the appellant was a breach of the provisions of the Enactment and an illegality.

[19] The appellant had also referred to *Nam Seng Co v Wing Yew (Tawau) Co Sdn Bhd* [1978] 2 MLJ 198. In this case, the appellant who was the third plaintiff in the civil action had claimed to be the assignee of a forest licence granted to the first defendant. The respondent was similarly an assignee whom the first defendant, the licensee, purported to substitute in place of the appellant. The appellant and two others had sued the respondent and two others, and the respondent had applied for the writ of summons and the action to be dismissed, on the ground, inter alia, that the claim was based on an illegal contract. The learned judge was of the opinion that the assignment of the licence was in breach of the Forest Enactment 1968 and the Forest Rules 1969 and therefore illegal and void. He had therefore made the order dismissing the action. The appellant had thereafter appealed. The Federal court on dismissing the appeal had held that the learned trial judge was correct in holding that the purported assignment of the forest licence was illegal and void. The court had opined that it was a licence issued under s 24 of the Forests Enactment 1968. This section reads:

> Subject to the provisions of this Enactment, the Conservator or any person authorized by him in that behalf may issue licences for the doing of all or any of the acts prohibited by section 20… of this Enactment upon such conditions and subject to the payment of such fees or royalties (if any) as may be prescribed or as may be specified in such licence.

[20] Under s 24(6) it was provided that:

> (6) A licence shall be personable to the holder thereof and shall not be transferable in any manner whatsoever and shall cease to be valid on the death of such holder...

[21] The court had remarked that as it was a licence issued under s 24 of the Forest Enactment 1968, hence non-transferable, the purported deletion of the

non-transferable clause 17 by the government was beyond its powers and thus null and void and of no effect. The appeal thus was dismissed.

[22] The approach was no different in the case of *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1981] 3 MLJ 151. Suffice if I merely pluck out 'held' 2, which sufficiently covers the main issue in that case, (and with the law applicable to this case) reading:

> (2) (Per Lamin PCA, Peh Swee Chin and Zakaria Yatim FCJJ)
>
> Under s 24(a) of the Contracts Act 1950, an agreement is illegal and unenforceable when either the consideration or the object of the agreement is to do an act forbidden by law. In this case, the illegal or prohibited act was the breach of condition 23 of the said federal licence which prohibited the assignment of rights. The agreement assigned wholly or partly the rights of the club granted by the federal licence by granting the appellant the exclusive right to conduct the off-course and on-course betting. As such the agreement amounted to a contract to do an act forbidden or prohibited by s 21 of the pool Betting Act 1967. This contradicted s 24(a) of the Contracts Act 1950 and the agreement was therefore illegal and void.
>
> At the outset it must be stated that we have no quarrel with the views or legal pronouncements of the above three cases. Regretfully we were unable to agree with the appellants that those cases supported their case as the facts in this appeal are distinctly distinguishable. In the agreement of 20 December 1988 between the company and the first appellant (taking one as an example, as word for word both agreements were similar except for the name of the nominees), an assignment of all the rights of the latter in the licence to the company had agreeably taken place. This assignment of rights was what was supposedly forbidden by statutory law ie s 9 of the Racing (Totalisator Board) Act) 1961. Further, one of the conditions of the licence, adverted to in support of the invalidity of the agreement, reads 'lesen ini tidak boleh di tukar milik atau disewakan kepada mana-mana pihak tanpa kebenaran Kementerian Kewangan (transfer of ownership or rental of this licence to any party is not permitted unless allowed by the Ministry of Finance).'

[23] We now reproduce s 9, ventilated by the appellants to be relevant, and it reads:

> 9. Officers, agents, etc. of the Board.
>
> (1) The Board may appoint such officers, agents and employees as it deems necessary for the efficient carrying out of its functions under this Act.
>
> (2) Except in accordance with and subject to an approved scheme, the Board shall not make or agree to make to any officer, agent or employee of the Board any payment by way of commission, fee, reward ort other remuneration which is calculated or determined or affected by reference, directly or indirectly, to the amount of any totalisator investment received by the Board or by that officer, agent or employee on behalf of the Board.
>
> (3) Section 26(1) and (2) of the Civil Law Act 1956(which relate to agreements by way of gaming and wagering) shall not be deemed to apply to any contract or agreement between the Board and any officer, agent or employee of the Board.

[24] Having perused s 9, specially selected by the appellants for our attention and deliberation, it was our view that it merely provided for the powers of appointment of officers, agents etc and miscellaneous issues. It was nowhere close to that of the

provisions in the Forest Enactment (Cap 153) discussed in the above *Leong Poh Chin v Chin Thin Sin*, the Forest Enactment 1968 and the Forest Rules 1969 discussed in *Nam Seng Co v Wing Yew (Tawau) Co Sdn Bhd*, and s 21 of the Betting Act 1967 in *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong*. In the latter cases the statutory laws were clear in relation to the prohibition.

[25] We have stressed on the statutory requirement as Peh Swee Chin FJ at p 176 in the above *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* had clearly stated:

> To decide if s 24(a) makes a contract illegal and unenforceable in connection with a statute, and this bears repeating, one must *find out first if the statute prohibits or forbids the act* which the parties have contracted to do by the contract in question, and not whether the statute prohibits the contract or the making of the contract in question by the parties. This difference is real, though very subtle. (Emphasis added.)

[26] So, did the statute per se, in this case the Racing (Totalisator Board) Act 1961 (Act 494) prohibit or forbid the assignment of all the rights of the first appellant in the licence, to the company? The answer has to be in the negative as this Act was deliberately promulgated to provide for the establishment of a Totalisator Board, the powers of such Board, the conduct of betting by agencies of such Board, and for matters incidental thereto. Section 9 primarily bespoke of the powers of the Board to appoint officers, agents and employees as it deemed necessary for the efficient carrying out of its functions. Section 16, also brought to our attention by the appellants, pertained to the submission and approval of a totalisator agency scheme in respect of race meetings. This scheme could also provide machinery necessary for the proper operations and control of totalisators and totalisator agencies, or for the operation of it. In a nutshell the appellants were barking at the wrong tree when referring to this Act. There was nothing in it about the issue of prohibition submitted by the appellants.

[27] The fact that the licences could be transferred or the ownership transferred, if allowed by the Ministry of Finance, unlike the facts in the above three cases where prohibition was total, rejects any notion that this Racing (Totalisator Board) Act 1961 prohibits the appellants' contractual acts. It must be borne in mind that ownership of the licences had still remained with the respective licencees even until now. As the facts showed, even the conditions in the licences had never been allowed to be changed, and factually were never even rented out to the company. With that failure by the appellants to convince us that the abovementioned Act had been contravened there was thus no necessity for us to discuss s 24 of the Contracts Act 1950.

[28] With the above argument out of the way we were thus left with the substantive issue of whether there was oppression committed by the appellants on the respondent hence the return to the mainstream. Article 81, supplied above, in crystal clear terms empowers a member to nominate a director for every 25% of the issued capital of the company held by him or nominees. It was beyond denial that the first appellant had exercised that right by the second appellant's appointment. Yet at the Board meeting of 10 November 1999, despite the respondent having moved the

Board for her rights and entitlement to equal management and control in exercise of that right, in the like of the appointment of an additional director, it was rejected. In other words, her 50% share and rights entrenched in the Articles of Association, counted for nothing as they had been rendered meaningless by the combined force of the first appellant and the second appellant. And this was despite the fact that art 82 not only allowed nomination but also appointment without the necessity of the Board's deliberation. In the course of the appeal the court was not unmindful of the fact that the appellants had never denied the rights of the respondent to nominate and appoint whomsoever she likes, but that defeat of the respondent had come about after a properly conducted meeting. The appellants' interpretation of a properly conducted meeting did not amuse us, as despite her 50% casting vote, her nomination was rejected.

[29] Whether the rejection of the respondent's nomination by itself tantamount to oppression, the case of *Chloride Eastern Industries Pte Ltd v Premium Vegetables Oils Sdn Bhd* [2002] 2 MLJ 43, will shed some light to the problem. At held (3) is recorded:

> In refusing to nominate a representative of the petitioner to be a director, it was clear that the existing directors of the respondent wanted to dominate the board of directors to the total exclusion of others including the petitioner. The court found this an act of oppression against the petitioner.

[30] The words above are unambiguous, and no amount of twisted interpretation can deny the respondent the court's sympathy, especially when the appellants were not disinterested parties. The nexus of being husband and wife, more of a disadvantage in this case, exacerbated by their subsequent behaviour of rejecting the respondent's nominee, instead of honorably enforcing art 81, cleared any doubts that the appellants had intended to dominate and exclude the respondent from the administration of the company. Instead of being sensitive to their marriage status, and should have tried doubly harder to be more equitable, they had instead done the reverse, namely behaving arrogantly and oppressively towards the respondent.

[31] Walter CM Woon LLB (Sing), LLM (Cantab) in *Company Law* at p 118 had occasion to author the following:

> Section 216 may be invoked where there is 'oppression' of a member or where a member's interests are 'disregarded'. It may also be invoked where there is a resolution or act that 'unfairly discriminates' against or is 'otherwise prejudicial' to a member. The term 'oppression' has been variously defined. In *Scottish Co-operative Wholesale Society Ltd v Meyer* Viscount Simonds defined the term as 'burdensome, harsh and wrongful' taking the dictionary meaning of the word. Buckley LJ's definition of oppression in *Re Jermyn Street Turkish Baths Ltd M* is as follows:
>
> > In our judgment, oppression occurs when shareholders, having a dominant power in a company, either (1) exercise that power to procure that something is done or not done in the conduct of the company's affairs or (2) procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company's

affairs; and when such conduct is unfair….to the other members of the company or some of them, and lacks that degree of probity which they are entitled to expect in the conduct of the company's affairs.'

At the very least, there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every member is entitled to rely (*Elder v Elder & Watson Ltd (1952) SC 49*, 55 per Lord Cooper LP (Court of Session Scotland); echoed by Lord Wilberforce in *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 (Privy Council on appeal from Malaysia).

[32] Taking a leaf from the above write-up, and even though the solitary but substantive example of the rejection of the respondent's nomination of her own director sufficed to dismiss the appeal, for completeness we had taken the extra mileage of considering the other abuses during the appeal (conduct which were 'a visible departure from the standards of fair dealing and a violation of the conditions of fair place which a shareholder is entitled to expect before a case of oppression can be made'). It is trite that what constitutes oppressive behaviour is a question of fact (*Ng Sing King & Ors v PSA International Pte Ltd & Ors (No 2)* [2005] 2 SLR 56).

[33] That oppressive new found power, inter alia, was again flaunted when at that same meeting of 10 November 1999 the second appellant had proposed that the first appellant (his wife) be paid a salary backdated to 1 July 1999. Such procedure not only was contrary to art 85, which provided that a director's remuneration be determined at a general meeting, but also contrary to the agreed equal ownership and equal benefits principle. With the effective implementation of that backdated payment of salary and remuneration proposal to the first appellant, she and the second appellant had collectively earned more than double that of the respondent's financial entitlement. This decision therefore was beyond justification as only the general meeting, and not the board of directors, held the power to decide on a director's salary let alone backdating it.

[34] On this issue *Palmer' Company Law* (24th Ed) 904 had occasion to state:

Where the articles provide that the remuneration of the directors is to be fixed by the company in general meetings, a director has no right of action for remuneration allotted to him by a resolution of the board alone.

[35] As payments had already been made, with such remuneration being a form of self-enrichment pursuant to oppressive conducts, the appellants therefore must return those ill-gotten gains.

[36] To justify their conduct and acts of oppression as illustrated above, the appellants had submitted that the respondent had failed to show any interest in the administration of the company, especially in meetings. In fact they alleged that she had also been absent in a few meetings. We were not convinced by that argument as when the respondent garnered the assistance of her husband, as she was uneducated and spoke no English, he was ordered to leave and never to return. Even when she attended the earlier meetings her views were consistently ignored. Being frustrated, and seeing the pointlessness of her presence, her absence thereafter became more

frequent. It was our considered view that even if she had not attended the relevant meetings, her 50% financial rights could not be disregarded; resolutions which were against her interest or the company too should not have been passed.

[37] It was bad enough that the appellants had collectively earned more than the respondent, but in the course of their misfeasance had also spirited away the company's investment in related companies to themselves, eg Kumpulan Ariffin Nordin Sdn Bhd ('KAN'). Initially the company had acquired 80,001 from KAN but with no opposition prevailing in the board meetings the appellants had transferred those shares to themselves. On this issue the High Court judge had succinctly written:

> Now I turn to other complaints advanced by the petitioner that the respondents had acted in breach of their directors' fiduciary duties by transferring to themselves the 80,001 shares which they held in trust for the company in Ariffin Nordin Holdings Sdn Bhd. Perusal of the exhibits C12 and RR25 shows that this associated company was registered in the names of the respondents, who each held equal number of shares. It is also evident that the Board of Directors Meeting on two occasions had resolved that the company lent out RM241,321.85 and RM269,338.90 respectively to Ariffin Nordin Holdings Sdn Bhd free of interest. It is also noted that the petitioner on 17 October 1996 wrote to the company's secretary requesting the respondents to report the status and progress of the company's investment in Ariffin Nordin Holdings. Although the respondents in their affidavits asserted that ANN was their own company, the evidence taken together convinced me that the respondents were in fact trustees for the company and holding the shares in trust for the company. As such the respondents by transferring the shares of the associated company to themselves were in breach of that trust.

[38] Having sifted the evidence, we found absolutely no basis to disagree with the High Court's order pertaining to the return of the shares to the company, as there was overwhelming evidence to support such finding. And this was despite the fact that the learned High Court judge had inadvertently referred to KAN as ANH shares at p 47 of the appeal records. It is fundamental that during the 'oppressive period' they were occupying a fiduciary position, and entrusted to deal with the company's properties for the benefit of the company. They were thus barred from using or dealing with the entrusted properties for their private benefit.

[39] To wind it up, right from the start when her right to nominate her representative was rejected, passing of resolutions by the appellants entitling themselves to remunerations, advances etc, their unreasonable refusal of the respondent's request, assisted by an accountant to inspect the records, the subsequent enrichment of themselves of KAN shares etc were more than ample grounds to dismiss the appeal. The combined overwhelming evidence had clearly pointed to the appellants having conducted the affairs of the company in a manner that was oppressive, discriminatory, and prejudicial to the respondent. We thus had no reason to disagree with the High Court judge's findings crystallized in his well written judgment. There was thus no error in the High Court ordering the refund of any unauthorized and improper director's salary, the return of any unauthorized payments to the company, and the declaratory orders made. Based on the above reasoning we would dismiss the appeal with costs. The order of the learned judge in

paragraph (e) is varied to read 'to the date until our decision today'. The order of Sulaiman Daud J is set aside. All the monies expended during the stay order of Sulaiman Daud J are refunded to the company. The order of the learned judge except paragraph (e) is hereby affirmed. Deposit is to be paid to respondent to the account of taxed costs.

Appeal dismissed.

Reported by Peter Ling